

## Stratus Damages reports/depositions

Page 1 of 2

Jaromin, Michelle

**From:** Ehrich, Delmar R. [DEhrich@faegre.com]  
**Sent:** Friday, March 13, 2009 4:50 PM  
**To:** Xidis, Claire  
**Cc:** George, Robert; Jorgensen, Jay T.; Jones, Tim; Scott McDaniel; John Elrod; jtucker@rhodesokla.com; Mark\_Quayle@cargill.com; Triplett, Eric J.; Robert Sanders; James Graves; Deihl, Colin C.; Mark\_Quayle@cargill.com; Moll, Ingrid; Baker, Fred; Kelly.Burch@oag.ok.gov; David Page; David Riggs; Richard Garren; Bob Nance; Louis Bullock; bblakemore@bullock-blakemore.com; Ward, Liza; Daniel.Lennington@oag.ok.gov; Trevor.Hammons@oag.ok.gov; Deihl, Colin C.; Jones, Bruce; Herber, Daniel J.  
**Subject:** RE: Stratus Damages reports/depositions

Claire – I have several times stated my belief that Rule 26(a) requires the plaintiff to disclose the opinions and bases therefor for each expert it intends to call at trial. The Stratus reports do not do so. Nor did the state make a separate Rule 26(a) disclosure for each testifying expert disclosed on January 5, 2009. I also make this practical observation: Judge Frizzell is exceedingly unlikely, in my view, to allow the plaintiff to put on seven experts to testify as to the plaintiff's alleged damages. So, from the defendants' perspective, how are we to determine what anywhere from one to seven experts might say at trial about his or her opinions as to plaintiff's alleged damages.

The state's continued refusal to supplement its disclosure furnishes the defendants the basis to move to strike the Stratus expert report.

Taking my conversation with Rick Garren last night as part of the meet and confer process, however, I suggested that we and the plaintiff might engage in a discussion aimed at resolving the issue, and suggested we might talk about which Stratus author wrote which portions of the report. In short, it was a practical suggestion to try to work out what disclosure might mitigate the prejudice the defendants currently are suffering. I am still willing to engage in such a discussion.

As I said in my voice mail to you last night, I understood Mr. Garren to suggest that plaintiff was seeking an additional 29 days from April 16 in which to review the reports of the defendants' damages experts and to take their depositions. What I added was the suggestion to you that defendants and plaintiff agree to take damages depositions out of time, that is, after April 16, and up to June 15.

As further context for this suggestion, let me add now what I didn't add to my voice mail last night: the remaining damages discovery includes not just the defendants' depositions of the Stratus authors and the plaintiffs' depositions of the defendants' damages experts, but also additional discovery responses and other depositions. First, the defendants need dates for the deposition of David Payne, which is likely to be a multi-day affair given that he has authored a report as to each named defendant.

Second, the plaintiff also owes the defendants supplementation of its responses to the defendants' various damages interrogatories and document requests as to the government agency response cost claim. I will send you a letter today providing the specific Cargill discovery requests which require the state's supplementation. I also expect to serve a notice shortly for a Rule 30(b)(6) deposition of the state as to that claim. Depending on how that deposition goes, we may also take the depositions of some or all of the 12 agency response cost witnesses listed in the states' February 19 witness list.

Now, this is a lot to accomplish by April 16, and the defendants are certainly prepared to march through these depositions by April 16. However, it seemed to me that a more orderly approach would be to work hard at scheduling these depositions in April and May, which would accommodate the plaintiff's request for additional time to consider the defendants' damages expert report. The deadline for that report would remain March 31. If we can reach an agreement on further disclosure of the opinions of the separate Stratus authors, we would be pleased to take those depositions during the first two weeks or so of April (the key variable being, of course, the availability of the plaintiff's experts.) I suggest that we start with Dr. Chapman to get the road map, as you suggest, and follow his deposition about a week later with depositions of the plaintiff's experts produced in the order in which plaintiff expects to call them at trial.

Further, as part of this proposal, we would be pleased to provide dates for the defendants damages experts in late April or May.

If this framework is acceptable, we can also work to schedule David Payne's deposition and the deposition of the State's designee on agency response costs and the 12 factual witnesses on agency costs (if they remain necessary after the Rule 30(b)(6) deposition on agency response costs.) As to the scheduling of all these depositions, we are willing to use the first two weeks of April if that becomes necessary to accommodate schedules.

There is precedent in this case for taking some depositions out of time. I understand that David Page and James Graves have agreed that defendants will take Jack Jones' deposition on May 19<sup>th</sup> in Tulsa, and plaintiff will take Jim Chadwick's on June 17-18 in Tulsa. I understand counsel for defendants and plaintiff are working on dates for the depositions of Merrill and Cummins in June. The objective is to make one application to the Court once the parties we have agreed dates for these depositions.

I would be pleased to discuss this proposal with you, Rick or anyone else on the plaintiff's side.

Regards,

Del

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**From:** Xidis, Claire [mailto:cxidis@motleyrice.com]

**Sent:** Friday, March 13, 2009 10:33

**To:** Ehrich, Delmar R.

**Cc:** George, Robert; Jorgensen, Jay T.; Jones, Tim; Scott McDaniel; John Elrod; jtucker@rhodesokla.com; Mark\_Quayle@cargill.com; Triplett, Eric J.; Robert Sanders; James Graves; Deihl, Colin C.; Mark\_Quayle@cargill.com; Moll, Ingrid; Baker, Fred; Kelly.Burch@oag.ok.gov; David Page; David Riggs; Richard Garren; Bob Nance; Louis Bullock; bblakemore@bullock-blakemore.com; Ward, Liza; Daniel.Lennington@oag.ok.gov; Trevor.Hammons@oag.ok.gov

**Subject:** RE: Stratus Damages reports/depositions

Delmar -

I have received your voicemail and below email message. You misunderstand, and misstate, the State's request. By Defendants receiving an extension until March 31 to disclose their damages experts and reports, the State's time period to depose such experts was significantly shortened from 45 days to 15 days. The State simply needs the same amount of time that it had before - 45 days - to review the reports and considered materials, and complete the depositions. If the Defendants are unwilling to agree to an extension of 29 days from the close of discovery, which is April 16, for the State to take depositions of the damages experts, we need you to provide dates for Dr. Raussers' deposition on his injury report to Rick Garren as soon as possible, and the State will be filing a motion seeking this extension.

With respect to the Defendants' request for more time to take depositions of the Stratus experts, Defendants have until April 16th (although you requested deposition dates prior to March 30th, which have been provided). By April 16th, Defendants will have had three and a half months to depose the State's damages experts. Thus, the State is not willing to agree to an extension of this deadline for the Defendants, or to any extension for the deadline for the Defendants' expert reports on damages.

With regard to deposition scheduling for the Stratus authors, I had written you on Wednesday that I would need to hear from you by the close of business yesterday as to whether Defendants accepted any of the dates we offered for the Stratus experts. I did not hear from you until after 7:00 last night, and you still have not committed to any of the proposed dates. I need to hear from you today with a final yes or no on these dates. This runaround is not productive.

It is my understanding that in your conversation with Rick Garren, you asked that the State inform you as to which authors wrote which chapters of the report. This is a different request than what you set forth in your Feb. 12 and March 10th emails. As you know, David Chapman was the project manager for Stratus for this report. He is the first person we have offered for deposition, and he will be able to explain the framework in which the report and underlying work were done. I suggest you take his deposition, and if you determine you do not need the depositions of other authors that we have offered, you can cancel those depositions.

I am available today if we need to set up a time to discuss these issues further.

Claire Xidis | Attorney at Law | Motley Rice LLC  
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4/1/2009

EXHIBIT

4

## Stratus Damages reports/depositions

Page 2 of 2

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**From:** Ehrich, Delmar R. [mailto:DEhrich@faegre.com]**Sent:** Thursday, March 12, 2009 7:16 PM**To:** Xidis, Claire**Cc:** George, Robert; Jorgensen, Jay T.; Jones, Tim; Scott McDaniel; John Elrod; jtucker@rhodesokla.com; Mark\_Quayle@cargill.com; Triplett, Eric J.; Robert Sanders; James Graves; Deihl, Colin C.; Mark\_Quayle@cargill.com; Moll, Ingrid; Baker, Fred; Kelly.Burch@oag.ok.gov; David Page; David Riggs; Richard Garren; Bob Nance; Louis Bullock; bblakemore@bullock-blakemore.com; Ward, Liza; Daniel.Lennington@oag.ok.gov; Trevor.Hammons@oag.ok.gov**Subject:** RE: Stratus Damages reports/depositions

Claire, I spoke with Rick Garren late this afternoon regarding plaintiff's request for an extension of 29 days after defendants submit their damage expert reports on March 31 in which to complete the depositions of the defense damage experts. I followed that with a voice mail message to you suggesting that you, Rick and I discuss that request, as well as the issues about which you and I have been communicating. I am generally available tomorrow for such a call. Would you let me know what works for you?

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**From:** Xidis, Claire [mailto:cxidis@motleyrice.com]**Sent:** Wednesday, March 11, 2009 14:49**To:** Ehrich, Delmar R.**Cc:** George, Robert; Jorgensen, Jay T.; Jones, Tim; Scott McDaniel; John Elrod; jtucker@rhodesokla.com; Mark\_Quayle@cargill.com; Triplett, Eric J.; Robert Sanders; James Graves; Deihl, Colin C.; Mark\_Quayle@cargill.com; Moll, Ingrid; Baker, Fred; Kelly.Burch@oag.ok.gov; David Page; David Riggs; Richard Garren; Bob Nance; Louis Bullock; bblakemore@bullock-blakemore.com; Ward, Liza; Daniel.Lennington@oag.ok.gov; Trevor.Hammons@oag.ok.gov**Subject:** RE: Stratus Damages reports/depositions

Delmar -

The suggestion that the State has been trying to delay Defendants' depositions of the Stratus experts is ridiculous. On Feb. 3, 2009, having heard nothing from Defendants on this issue, the State offered dates for these experts' depositions, and Defendants never substantively responded to that offer and have not subsequently attempted, until your email yesterday, to schedule these depositions. Furthermore, after your inquiry about the authors' opinions and materials on Feb. 12, 2009, I made the State's position on that issue clear to you on Feb. 13, 2009. The fact Defendants are now claiming this impairs their deposition preparation, after sitting on this issue for almost a month, and after having the disclosure and materials since January 5, 2009, places any delay efforts squarely on Defendants' shoulders.

Because Defendants waited so long to schedule depositions, there is very little if any flexibility in the schedules of these experts and counsel between now and March 30th. Below are the dates that the State can make the Stratus authors available for deposition in Tulsa. We will make each of them available at the Riggs Abney Tulsa office, starting at 8:30 am.

Chapman - March 18

Morey - March 20

Bishop - March 23

Tourangeau - March 25

Kanninen - March 26 for

Krosnick - March 27

Hanemann - March 29

I need to know by the close of business tomorrow whether Defendants accept these dates.

Claire Xidis | Attorney at Law | Motley Rice LLC

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**From:** Ehrich, Delmar R. [mailto:DEhrich@faegre.com]**Sent:** Tuesday, March 10, 2009 6:51 PM**To:** Xidis, Claire**Cc:** George, Robert; Jorgensen, Jay T.; Jones, Tim; Scott McDaniel; John Elrod; jtucker@rhodesokla.com; Mark\_Quayle@cargill.com; Triplett, Eric J.; Robert Sanders; James Graves; Deihl, Colin C.; Mark\_Quayle@cargill.com**Subject:** Stratus Damages reports/depositions

Ms. Xidis, we previously exchanged email concerning the seven authors of the Stratus damages reports. The defendants' position is that if plaintiff indeed intends to call all seven authors to testify at trial, then Rule 26(a) obligates plaintiff to disclose for each witness his opinions and bases therefor, as well as the considered materials for each such witness, appropriately marked as such. You have maintained that plaintiff has no such obligation.

It seems unlikely that each listed author will testify to exactly the same things. Moreover, if each did so, the court would likely exclude any witness after the first as cumulative. The plaintiff's position, therefore, appears designed to delay the defendants in their efforts to depose those CV authors whom the plaintiff expects to testify at trial and to complete the defendants' experts' rebuttal damages report, which is presently due March 30. Accordingly, I ask that you identify which authors plaintiff intends to call to testify, make the required Rule 26(a) disclosure as to each, and provide me with dates for their depositions on or prior to March 30.

Thank you.

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4/1/2009